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No. 53.

Iowa Life Ins. Co. v. Hamilton & Colbert for Def.

Filed Oct. 13, 1902.

# Supreme Court of the United States.

OCTOBER TERM, 1902.

**No. 53**

IOWA LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

*vs.*

LULU T. LEWIS.

**In Error to the Circuit Court of the United States for the Northern District of Texas.**

## BRIEF FOR DEFENDANT IN ERROR.

WILLIAM CAPPS,
S. B. CANTEY,
*For Defendant in Error.*

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# Supreme Court of the United States.

**No. 18,072.**

IOWA LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

*vs.*

LULU T. LEWIS, DEFENDANT IN ERROR.

**No. 265.**

## BRIEF FOR DEFENDANT IN ERROR.

### STATEMENT.

A writ of error was prosecuted in this case directly from the United States Circuit Court for the Northern District of Texas, upon the contention that the statute of the State of Texas, authorizing the holder of a life or health insurance policy, to recover twelve per cent damages and reasonable attorney's fees, in the event of loss accruing under the same, was contrary to, and a violation of the provisions of the Constitution. This principal issue and ground of appeal being now practically eliminated by the recent decision of this court in the case of "The Fidelity Mutual Insurance Co. *vs.* Mettler," the Defendant in Error will be permitted to reply chiefly to the two questions suggested in the brief by Plaintiff in Error, as being involved in the "main issue."

### First.

The court did not err in instructing the jury peremptorily that the defendant was estopped from setting up, as a de-

fense to the action, the failure on the part of the plaintiff to furnish it satisfactory proofs of loss, as required under the terms of the policy.

By the express terms of the contract between the defendant and S. E. Starn (which was in force during the time of the entire controversy, beginning with the application for the policy sued on, and ending at the time of the trial), said Starn was—

> "appointed its agent to solicit applications for life insurance throughout the State of Texas, and to collect the first year's premiums thereon; and with full power to appoint agents under the supervision of, and subject to the acceptance of said company, . . . (Rec., p. 32.) He signed the application which was sent to the defendant for its approval, as 'General Agent,' and his stationery, upon which his communications reached the defendant, described him in printed head lines as 'Dist. Manager'" (Rec. p. 35).

The agent Starn refused to furnish plaintiff any blank forms for making out the proofs under the policy, when requested so to do by plaintiff's agents, and claimed that he did not consider Mr. Lewis insured in the the company, as his policy had lapsed.

This action on the part of its agent, Starn, was faithfully reported to the secretary of the defendant company, and he was requested to advise the plaintiff's agents what stand the defendant had taken in the matter, and whether or not it desired to confirm the position of its agent. The secretary in turn referred the matter to the general counsel for the defendant, who in substance informed the plaintiff, that from the books of the company, it did not appear that Lewis was a policy-holder at the time of his alleged death (Rec., p. 25.)

The insurance contract contained a promise to pay three thousand dollars—

> "within sixty days after receipt and acceptance at the company's office in Chicago, Ill., of satisfactory proofs of the fact and cause of death. . . ."

Under this clause the company should determine for itself what it would accept as "satisfactory proofs," and a refusal to furnish blank forms, kept by it for that purpose, upon the ground that the policy had lapsed, was tantamount to a statement that the defendant was in no manner liable.

I. A denial of liability, or a denial of the existence of a contract by the insurer, is a waiver of the condition requiring proof of the loss or death.

Knickerbocker Life Insurance Co. *vs.* Pendleton, 112 U. S. 696.

May on Insurance, Secs. 469–473, 473A.

Insurance Co. *vs.* Lee, 73 Tex. 641.

Joyce on Insurance (Volume 4), Sec. 3380.

## Second.

The contentions of the plaintiff in error from pages 21 to 33 of its brief, on the subject of a forfeiture of the policy sued on, arose mainly upon an issue of fact, which under undisputed evidence was resolved adversely to it.

The whole subject of its position must necessarily depend upon whether or not the recitals on the back of the premium receipt became a part of the contract.

The writings being in evidence, afford the most convincing and conclusive evidence of what portion of the same, or what recitals in the same should, or were intended by the parties to constitute the agreement between them.

The policy proper recited that its terms, together with the application, should constitute the contract. It contained a provision that—

> "this policy . . . shall not go into effect until the premiums hereunder, or a semi-annual or quarterly installment thereof, shall have been actually paid during the life time of the insured."

The agent, Starn, accepted the application of the insured,

T. M. Lewis, and forwarded the same to the defendant, together with a promissory note (in terms of the highest negotiable character), signed by the insured. The defendant by accepting this note, and issuing and delivering the policy, waived this provision in its own judgment, beyond the hope of all cavil or question. Neither the policy nor the application mention the subject of the contract becoming determined by reason of the failure to pay any note which might be given or accepted for the premium (Rec., pp. 26–7).

The negative of such a proposition is manifest from the condition expressly set out, to the effect that the policy shall not go into effect until the premium, or some quarterly or semi-annual installment shall have been actually paid.

The receipt, regular and unconditional on its face, contained a recital on its back, that if a note be given for the premium and be not paid at maturity, the policy shall cease and determine. Still, above this recital on the receipt, it is expressly stipulated as follows: "For terms of mutual agreement, see application and policy." (Rec., p. 28). All of the writings by positive certainty of stipulation oblige the parties, and announce the mutual meeting of the minds, only upon the stipulations contained in the policy proper, and the application, and not upon those of a receipt, the giving of which was wholly unnecessary, and agreed by the writings to be no part of the "mutual agreement."

1. Where the contract contains no stipulation for forfeiture upon the non-payment of a note, given for the premium, when due, payment is not a condition precedent to the validity of the contract; and the policy continues in force, notwithstanding such non-payment at maturity.

Joyce on Insurance, Secs. 1212–1211, citing:
93 Ind. 7; 101 Mass. 558; 45 N. J. 543; 42 Mich. 19; 69 N. Y. 286.
May on Insurance, Secs. 345–345 E.

For the payment of the premium in question, the defendant had accepted a note, which, in the language of the

court, needed only the solvency of the maker to render it as good as currency. In doing so it waived the only express condition relative to the time when the policy should become effective. The evident intention of the parties was to treat the note as a cash payment, and the policy as in full force; especially so in view of the fact that the receipt was given for $74.61, being the full amount of the annual premium, while the note was for only one-half that amount, and the insured under the agreement with the agent, Starn, was to pay the balance in professional services.

Sixty-five per cent of the note belonged to the agent, Starn, under his contract; after its maturity, the defendant and Starn, as owners of the same, made the ordinary efforts to collect the same through a local bank, and the agent tried to collect it in person (Rec. p. ——)

The defendant did not evidence any intention to declare the policy forfeited, even if it had the right to do so; and if it had this right it should have declared such intention by some prompt and unequivocal statement or action.

The Mutual Insurance Co. *vs.* French, 30 O. St. 240; 27 Am. Rep. 443.

Cited in Insurance Co. *vs.* Thompson, 104 U. S. 253.

## Third.

The contention by plaintiff in error, wherein it challenges the validity of the statutes of Texas, awarding the right to recover twelve per cent damages and attorneys fees against accident and life insurance companies, has been settled by the late decisions in Insurance Co. *vs.* Mettler, ——, adversely to the propositions presented in the brief from pages 33 to 62.

## Fourth.

The proposition with reference to formal demands for the amount of the policy, beginning with page 62 of the brief of plaintiff in error, is not in our judgment supported in law or in fact.

The Statute of Texas, Article 3071, does not provide or contemplate that demand shall be made for the damages and attorney's fees, but for the loss accruing under the policy, and the twelve per cent damages and attorneys' fees follow the recovery.

There is no affirmative declaration by the court in the record showing that it regarded this demand or necessity therefor as waived, or whether the court found that the acts of plaintiff's agents amounted to a demand sufficient to satisfy the terms of the law.

There is no peculiar or particular phraseology necessary to constitute a demand. The interview between the persons representing plaintiff and the agent, Starn, was a demand for the loss; and the letter from plaintiff's attorneys to the defendant company amounted to a demand. The preparation, after this correspondence, of a formal demand and presentation of the same, would have been idle and futile, and the observance of which the law does not require.

It is a familiar legal principle that the necessity of a formal demand is often waived or obviated by the contract of the other party, or where the state of the case is such as to show that the demand would have been entirely unavailing.

Heard v. Lodge, 37 Mass. 53.

Abels v. Glover, 15 La. An. (La.) 724.

Lazensky v. The Supreme Lodge, etc., 31 Fed. Rep. 592.

Insurance Company v. Winning, 58 Fed. Rep. 541.

It is respectfully submitted that the judgment of the Circuit Court should be affirmed.

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